No. 12586

In The United States
Court of Appeals
For the Ninth Circuit

OSCAR ANDERSON and ALASKA FISHERMEN'S UNION, *Appellants,*

vs.

M. P. MULLANEY, Commissioner of Taxation of the Territory of Alaska, *Appellee.*

Upon Appeal from the District Court for the Territory of Alaska, Division Number One

Reply Brief for the Appellants

ROY E. JACKSON & CARL B. LUCKERATH
WM. L. PAUL, JR.,
For Appellants.

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Reply Brief for the Appellants

Appellee, in his brief, does not attempt to refute appellants' Point 1 (and argument thereunder pp. 7-10 of appellants' brief) that the trial court's finding, that 90% of the cost of collecting the tax is incurred in attempting to collect the tax from non-resident fishermen, is unsupported by the record and clearly erroneous. We take it that appellee concedes this contention to be correct. The appellee argues, however, that the expense and difficulty in attempting to collect the tax from non-

resident fishermen justifies the territorial legislature's separate classification between residents and non-resident fishermen, and that the mere fact that the legislature did not achieve mathematical precision or perfect uniformity between the additional enforcement cost and the additional amount of tax does not make the Act invalid.

Appellants respectfully submit that the appellee has overlooked and failed to consider the effect of some essential facts as disclosed by the record, and has misconstrued and attempted to unduly extend the holdings and dicta of some of the cases cited in his brief.

I.

THERE IS NO VALID BASIS FOR THE DISCRIMINATION AGAINST NON-RESIDENT FISHERMEN BASED UPON ALLEGED ADDITIONAL ENFORCEMENT BURDENS.

A.

The record does not show any actual additional expense incurred in collecting and enforcing the non-resident fishermen's tax as compared with the resident fishermen's tax.

It is true that appellee's witness, Thomas Parke, who is the territory's special deputy enforcement officer, testified that he had found it much more difficult to enforce the tax law against non-resident fishermen and that most of his time was spent with non-resident fishermen. But he also testified that his employment (and

presumably his salary) would continue even if there were no non-resident fishermen (R. 121).

Appellee, M. P. Mullaney, the Commissioner of Taxation, in response to appellants' interrogatories, stated in very general terms (R. 29-30) that it was more difficult and expensive to collect the tax from non-resident fishermen. However, he stated that he was unable to determine from the departmental records any answers to specific interrogatories (R. 33-34) propounded by appellants, which answers would have shown the amount or proportion of this additional expense, if such there was.

Thus the only alleged additional enforcement burden shown by the record is at best based upon mere conclusions and conjectures of appellee's interested witnesses.

B.

If there is any additional enforcement burden it is the result of the discrimination.

Appellee argues that the discrimination against non-resident fishermen is justified because of the added expense of enforcing the tax against that class. Even assuming, momentarily, that the record sufficiently shows some additional expense or difficulty of enforcement against non-resident fishermen, the record also shows clearly that such additional expense is caused by the very discrimination which it is said to justify. The deputy enforcement officer, Parke, testified that "lots

of" non-resident fishermen "evaded the tax by purchasing resident licenses" (R. 107, 109).

And the trial court stated in its opinion (R. 17) ". . . often there is a claim of local residence." Appellee, in his brief (at pp. 11, 12) also cites these instances of purchases of resident licenses by non-resident fishermen as proof of the difficulty of enforcement and wholesale evasion justifying the added tax.

Actually such instances constitute the most compelling proof that but for the discriminatory rate against non-residents the so-called added enforcement burden would disappear. This sort of circular reasoning, if accepted by the court, would permit the legislatures of Territories and States alike to evade the requirement of the equal protection clause of the Fourteenth Amendment, of the Civil Rights Act, and of the Commerce Clause, simply by imposing a higher tax on non-residents or non-citizens or other groups and then justifying the discriminatory additional tax because of the not unnatural fact that it would be more difficult to collect. In short, an unconstitutional tax would become constitutional simply because the unconstitutional tax was more difficult to enforce.

C.

Even assuming some valid basis for discrimination, there is no conceivable basis for the amount of differential imposed by the Act.

Assuming arguendo, that some small extra tax differential might be imposed on non-resident fishermen based upon a valid additional enforcement burden, the differential in the statute here under consideration—ten times the amount of the tax on resident fishermen—is patently an arbitrary discrimination against non-residents contrary to the clear term of the Civil Rights Act and without any conceivable basis in fact. Appellee argues (at pp. 14-18 of his brief) that the classification in the Act is not invalid on the ground that uniformity may not have been achieved with scientific accuracy. Appellants recognize, of course, the validity of this general rule of law, but the apparent pursuasiveness of appellee's arguments, when applied to the facts of the instant case, becomes more superficial than real. In our opening brief (pp. 14-15) we demonstrated the absurdity of the argument that any appreciable portion of the extra tax imposed against non-residents could be justified as representing actual or conceivable additional cost of enforcement. The differential of a five dollar resident license to a fifty dollar non-resident license must be based, under appellee's theory, upon the supposition that the territorial legislature could reasonably believe that it would cost at least $45.00 to collect a $5.00 tax. We respectfully suggest that the Act not only fails to achieve precise scientific uniformity and accuracy but further that it does, upon its face and upon the record, meet appellee's own test of invalidity

in that the tenfold differentiation is "wholly vain and fanciful, an illusory pretense."

An analysis of the cases cited on page 15 of appellee's brief will demonstrate the tenuous character of appellee's claim that those cases sustain the validity of the tax here in dispute.

Williams v. Mayor, 289 U.S. 36, upheld the validity of a State Statute exempting one railroad from certain taxes, where the statute showed on its face that it was a "reasonable exemption in furtherance of the public good"; this because the railroad was failing financially and its continued operation was necessary to the public. The Court said (at page 42) concerning the legislature's discretion, "Within the field where men of reason may reasonably differ, the legislature must have its way." We contend that the legislature could not reasonably assume the cost of enforcing the license tax could possibly amount to ten times the amount of the tax, and that the added tax against non-residents is clearly an unjustified and arbitrary discrimination.

In *Welch v. Henry,* 305 U.S. 134, also cited by appellee, the Court merely upheld validity of a state tax which operated retroactively against corporate dividends. The Court, in addition to the words quoted by appellee concerning "precise scientific uniformity," also stated "Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not

fall within the constitutional prohibition." Here the discrimination is substantial and its amount must be the result of arbitrariness or caprice.

Lawrence v. State Tax Commission, 286 U.S. 276, merely upheld the validity of a state statute which taxed the income of its residents but exempted corporate income earned outside the state. *Tax Commissioners v. Jackson,* 283 U.S. 527, also cited by appellee, is equally inapposite. It upheld an occupational tax levied on each individual chain store.

General American Tank Corporation v. Day, 270 U.S. 367, cited by appellee, supports appellants. In that case the State of Louisiana imposed a tax of 25 mills per dollar on the rolling stock of non-resident corporations operated within the state and exempted all who paid such tax from local taxation which would have amounted to about the same rate. The constitutionality of the tax was assailed on the ground that it constituted a discriminatory denial of equal protection because the local taxes in lieu of which the 25 mill tax was assessed actually amounted to only 21 mills. The Supreme Court said (at p. 373) "In the absence of a purpose to discriminate disclosed by the legislation itself, we are not prepared to say that a four mills variation in one year not shown to be a necessary or continuing result of the scheme of taxation adopted, would be an unconstitutional discrimination; for in such a scheme . . . however fairly devised, it would be impossible to provide

in advance against occasional inequalites as great as that here complained of." The Court then went on to say that the record did not substantiate the alleged four mill discrimination, and that "The appellant has, therefore, failed to show that the tax is discriminatory either in principle or in its practical operation and has laid no foundation for assailing its constitutionality."

In the instant case, contrary to the facts of the *General American Tank Car* case, *supra,* the actual discrimination is disclosed on the face of the legislation itself, the variation is substantial and is a necessary and continuing result of the scheme of taxation adopted, and the tax is discriminatory both in principle and in its practical operation.

Appellee argues that our reliance upon the words "a differential which would merely compensate the State for any added enforcement burden they may impose," from *Toomer v. Witsell,* 334 U.S. 385, 399, means that we think such differential must be shown with mathematical certainty to equal the added enforcement cost. As shown above we do not contend that the legislature need achieve mathematical certainty, but merely that some reasonable degree of relationship between the added cost and added tax must be present. Appellee further contends that the true rule of the *Toomer* case is that a discrimination is not invalid unless it has the effect of excluding non-residents altogether, or nearly so. It is appellee's interpretation of the *Toomer* decision, not

ours, which would overrule a long line of decisions.

In several cases, the Supreme Court has invalidated taxes which discriminated against non-residents without any sort of requirement that the discrimination be so great as to exclude non-residents. Thus in *Bethlehem Motor Corp. v. Flynt,* 256 U.S. 421, the Supreme Court held unconstitutional a state tax which imposed a license of $500 on manufacturers of automobiles who engaged in the business of selling them within the state, but merely imposed a license of $100 on manufacturers of automobiles if three-quarters of their assets were located within the state. The Court said (at p. 426) "The condition can be satisfied by a resident manufacturer, his factory and its products being within the State; it cannot be satisfied by a non-resident manufacturer . . . Therefore there is a real discrimination and an offense against the Fourteenth Amendment." *Chalker v. Birmingham & N. W. R. Co.,* 249 U.S. 522, held unconstitutional a state statute which imposed a license of $100 on foreign construction companies doing business within the state whose chief office was outside the state, and a license of $25.00 on domestic or foreign construction companies doing business within the state whose chief office was within the state. The Court said that ordinarily out-of-state corporations would have their chief office outside the state while domestic corporations' chief offices would be within, and that (at p. 527) "Practically, therefore, the statute under consid-

eration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay." It need scarcely be said that neither the $500 tax against non-resident automobile manufacturers in the *Bethlehem Motor* case, nor the $100 tax against out-of-state construction companies in the *Chalker* case, would in any sense exclude the corporations from doing business therein.

Suffice it to add that appellee has not cited any cases, nor have appellants discovered any, in which additional enforcement costs have been held to justify or validate a tax discrimination against non-residents.

II.

THERE CAN BE NO LEGITIMATE ENCOURAGEMENT OF THE DEVELOPMENT OF THE TERRITORY BY MEANS OF TAX DISCRIMINATION.

The classification in the Act may not be justified as a legitimate means of fostering the development of the Territory. Appellee's argument to the contrary simply ignores the specific provisions of the Civil Rights Act (Appendix B, appellant's opening brief) that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and shall be subject to like . . . taxes, licenses and exactions of every kind, and to no other." Any attempt to encourage development of

the Territory by imposing lower taxes on residents than on non-residents for the same activity, as was done here, would clearly constitute an unlawful discrimination. As pointed out by Judge Folta in *Martinsen v. Mullaney,* 85 F. Supp. 76 (see p. 11, appellant's opening brief), *Haavick v. Alaska Packers Assn.,* 263 U.S. 510, and other cases relied upon by appellees, overlooked the provisions of the Civil Rights Act.

III.

APPELLANT HAS SUSTAINED ITS BURDEN OF PROOF.

Appellee relies heavily and almost exclusively on presumptions of constitutionality and validity. While some of the language from the cases, as quoted by appellee (e.g., "The burden is on the one attacking the legislative arrangement to negative every conceivable basis that might support it."—p. 16, appellee's brief), might seem so broad as to in effect establish an almost conclusive presumption of validity, the actual holdings of the cases clearly demonstrate that the courts will not uphold discriminatory legislation on the basis of imaginary or illusory suppositions such as are tendered by appellee. For example, if the Court in the instant case can presume that the difficulty of enforcement of non-resident fishermen license justifies a tax ten times greater than that imposed on residents, the Supreme Court in *Chalker v. Birmingham & N. W. R. Co.,* could equally well have presumed that the difficulty of enforcing the tax on foreign corporations justified the

license which was four times that of domestic corporations, or it could have presumed that a substantial number of foreign corporations doing business within the state had their chief offices within the state, and therefore could qualify for the lower rate. However, the Supreme Court indulged in no such flights of fancy but based its decision upon reason and practicality, saying "Practically, therefore, the statute under consideration would produce discrimination against citizens of other states . . ."

If it is appellee's contention that appellants must show the exact ratio of expense attributed to collection of non-resident taxes as contrasted with expense attributed to cost of collection of resident taxes, we call the court's attention to the fact that appellee himself has foreclosed that possibility by keeping such inadequate records that not even he could compute those statistics. The Commissioner should not be allowed to successfully forstall attacks on the validity of a discriminatory tax by failing to maintain adequate records and then asserting in most general terms that the discrimination complained of is justified by the difficulty and expense of collection.

The Act upon its face shows a real, substantial and continuing discrimination against non-residents of the Territory of Alaska. No justification appears either in the Act or in the record herein for this discrimination or particularly for the highly excessive and arbitrary amount thereof.

CONCLUSION

For the reasons shown in appellants' opening brief, and in this its reply brief, it is respectfully submitted (1) that the decree of the District Court should be reversed to the extent that it holds Chapter 66, Session Laws of Alaska, 1949, as a valid Act, and (2) that the case should be remanded to the court for entry of a decree enjoining appellee from further collection of taxes under said Act, particularly with respect to non-residents, and directing the refund of taxes theretofore illegally collected thereunder.

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